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10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**

12 DONNELL D. FULCHER,
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14 Petitioner,

15 v.

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17 S. HATTON, Warden,
18 Respondent.
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Case No. 16-cv-02041-BAS-BGS

ORDER:

(1) **APPROVING AND
ADOPTING REPORT AND
RECOMMENDATION IN ITS
ENTIRETY (ECF No. 11);**

(2) **GRANTING PETITIONER'S
MOTION FOR VOLUNTARY
DISMISSAL (ECF No. 10);
AND**

(3) **TERMINATING AS MOOT
RESPONDENT'S MOTION TO
DISMISS (ECF No. 7)**

23 Petitioner, a state prisoner proceeding *pro se* and *in forma pauperis*, submitted
24 a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254. (ECF No. 1.)
25 Respondent moves to dismiss the Petition. (ECF No. 7.) Respondent argues the
26 Petition should be dismissed because Petitioner previously challenged the same
27 conviction in *Fulcher v. R.H. Trimble*, Case No. 11-cv-0959-CAB-WMC (S.D. Cal.
28 filed May 2, 2011). (*Id.*) In addition, Petitioner moves for voluntary dismissal of his

1 Petition. (ECF No. 10.) In his motion, Petitioner concedes that he lacks leave from
2 the Ninth Circuit Court of Appeals to file this second and successive petition. (*Id.*)
3 Thus, Petitioner requests that the Court dismiss his Petition without prejudice. (*Id.*)

4 On January 31, 2017, U.S. Magistrate Judge Bernard G. Skomal issued a
5 Report and Recommendation (“R&R”) recommending that this Court grant
6 Petitioner’s motion for voluntary dismissal. (ECF No. 11.) The magistrate judge
7 reasoned that dismissal without prejudice is appropriate under Federal Rule of Civil
8 Procedure 41(a)(2). (*Id.*) No objections have been filed to the R&R.


9 The Court reviews *de novo* those portions of the R&R to which objections are
10 made. 28 U.S.C. § 636(b)(1). The Court may “accept, reject, or modify, in whole or
11 in part, the findings or recommendations made by the magistrate judge.” *Id.* But
12 “[t]he statute makes it clear that the district judge must review the magistrate judge’s
13 findings and recommendations *de novo if objection is made*, but not otherwise.”
14 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc); *see*
15 *also Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1226 (D. Ariz. 2003) (concluding
16 that where no objections were filed, the district court had no obligation to review the
17 magistrate judge’s report). “Neither the Constitution nor the statute requires a district
18 judge to review, *de novo*, findings and recommendations that the parties themselves
19 accept as correct.” *Id.* “When no objections are filed, the *de novo* review is waived.”
20 *Marshall v. Astrue*, No. 08cv1735, 2010 WL 841252, at *1 (S.D. Cal. Mar. 10, 2010)
21 (Lorenz, J.) (adopting report in its entirety without review because neither party filed
22 objections to the report despite the opportunity to do so).

23 In this case, no objections have been filed, and neither party has requested
24 additional time to do so. Consequently, the Court may adopt the R&R on that basis
25 alone. *See Reyna-Tapia*, 328 F.3d at 1121. Having nonetheless conducted a *de novo*
26 of the R&R, the Court concludes that Judge Skomal’s reasoning is sound.
27 Accordingly, the Court hereby **APPROVES** and **ADOPTS** the R&R in its entirety
28 (ECF No. 11), **GRANTS** Petitioner’s motion for voluntary dismissal (ECF No. 10),

1 and **TERMINATES AS MOOT** Respondent's motion to dismiss (ECF No. 7).
2 Accordingly, the Court **DISMISSES WITHOUT PREJUDICE** this action. The
3 Clerk of the Court is directed to close this case.

4 **IT IS SO ORDERED.**

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6 **DATED: February 17, 2017**


7 **Hon. Cynthia Bashant**
8 **United States District Judge**